"generally affordable." Id. para. 112. In sparsely populated Western states, there is simply not a large enough revenue base of interstate telecommunications providers to fund a state mechanism sufficient to replace the 75 percent federal shortfall. As a result, rural telephone companies will have to implement substantial local rate increases which will threaten the 94.2 percent penetration which the Commission has worked for decades to attain.

Hence, the Commission should reconsider its decision to only fund 25 percent of the federal Universal Service support mechanism. The issue was not considered by the Joint Board and constitutes an unlawful separations change; the notion that the Commission can burden the states with 75 percent of an unfunded federal mandate misreads the statute and violates recent Supreme Court holdings[9]; and such undue reliance upon the states renders the Commission's mechanism both insufficient and unpredictable, contrary to the 1996 Act.

D. Conclusion

The Commission's proposed future mechanisms will slash the federal Universal Service support provided to rural telephone companies. FLEC modeling will lower the support ceiling; the nationwide revenue benchmark will raise the support floor; and then the 25 percent provision will obliterate most of the reduced support remaining. The result is an unwarranted rewrite of Section 254 (particularly its "sufficiency" provisions) and disregard of Congressional intent, and should be reconsidered.

IV. BY DEFINING UNBUNDLED NETWORK ELEMENTS AS "OWNED" FACILITIES AND GRANTING ELIGIBLE STATUS BASED ON DE MINIMIS OWNERSHIP OF FACILITIES, THE USF ORDER VIOLATES CONGRESSIONAL INTENT TO ENCOURAGE RURAL INFRASTRUCTURE DEVELOPMENT

Section 214(e)(1)(A) of the Communications Act provides that a carrier is eligible to receive Universal Service support if it "offer[s] the services that are supported by Federal

[9]See Printz v. United States, 1997 U.S. LEXIS 4044 (1997)(holding that the Federal Government may not compel States to enact or administer a federal regulatory program).

universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services." 47 U.S.C. § 214(e)(1)(A). The Commission has concluded that the facilities ownership requirement, which is an indispensable requirement for receiving Universal Service support, may be met entirely by the use of unbundled network elements. USF Order para. 154. The Commission has found that even de minimis use of unbundled network elements is sufficient. Id. para. 169.

This interpretation does nothing to promote infrastructure development in rural and hard-to-serve areas, but instead encourages "parasites" who will feed off the investments and drain funds from the incumbent carrier. Such a result is patently at odds with the intent of Congress that "[t]hose who have taken the risks and made the investments to extend cable or phone service to smaller rural communities should not now be placed at risk of being overwhelmed by larger, better financed companies." 141 Cong. Rec. S8478 (June 15, 1995)(Sen. Daschle speaking).

The Commission defends its conclusion that a carrier "owns" property that it did not finance or construct, and does not maintain, by relying upon obscure property and personal injury cases, some of which pre-date the 1996 Act by more than a century. An examination of the 1996 Act itself, however, reveals that a proper interpretation of the term "ownership" is much closer at hand. In the 1996 Act, Congress demonstrated that it understood the difference between one who owns a communications facility and one who merely operates or controls it. See 1996 Act § 202(b)(1) (distinguishing between owning, operating, or controlling a broadcasting station)(codified at 47 C.F.R. § 73.3555); id. § 703 (distinguishing between owning or controlling poles)(codified at 47 U.S.C. § 224(a)(1)). Clearly, if Congress had intended that an eligible carrier have as tenuous a bond to "ownership" as leasing facilities, it would have said so.

Indeed, in devising its "interpretation," the Commission once again elevates "competitive neutrality" at the expense of Universal Service and contrary to the plain meaning of the statute.

In justifying the use of unbundled network elements by eligible carriers, it states that "a carrier may be discouraged from offering supported services . . . via unbundled network elements solely because [universal service] support may be available to competitors and not itself." USF Order para. 166. However, the Commission disregards the fact that Congress unequivocally required a carrier to "own facilities" as a condition of eligibility for Universal Service support under Section 214(e)(1), and thereby established just such a barrier in order to assure the continued viability of Universal Service, encourage investment in telecommunications infrastructure, and prevent cream-skimming.

The Commission's attempt to justify its differing treatment of resellers versus those leasing unbundled elements is particularly noteworthy. The Commission correctly points out that a "pure reseller" will not bear the full cost of facilities in high cost areas; and then contends that a carrier using unbundled elements will bear such costs. Id. para 162. Yet, as the Commission admits, the "full cost" it is talking about is only the "forward looking" costs of the incumbent LEC, id., which the Commission has conceded to be below actual embedded costs in the majority of cases. See Access Charge Reform, CC Docket No. 96-262, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, FCC 96-488, paras. 249 - 255 (rel. Dec. 24, 1996)(discussing differences between embedded and forward-looking costs).

In sum, the Commission's decision to give away Universal Service support to carriers who only lease network elements is a blatant violation of section 214(e)(1)(A) of the 1996 Act, which requires a carrier to "own facilities" before it can receive this limited resource. The 1996 Act demonstrates that Congress well understood the difference between ownership and leasing and, notwithstanding the remote cases relied upon by the Commission, the plain language of the statute should be honored. The Commission should reconsider this matter, and permit only carriers that own all, or substantially all, of their own facilities to qualify for federal Universal Service support.

CONCLUSION

It is clear that Section 254 of the Communications Act was created to compensate for the inevitable and well-known failings of the competitive marketplace. Through Section 254, Congress intended to preserve and advance Universal Service, and it expressly adopted six core principles designed to ensure that this goal would be achieved. The Commission should implement a federal rural Universal Service mechanism embodying these Congressional principles, and should reconsider and reject its attempts to both recast Universal Service as a pro-competitive device and slash the transitional and long-term federal Universal Service support available to rural telephone companies.

Respectfully submitted,
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DATED: July 17, 1997